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IN THE

Supreme Court of the United States.

No. , October Term, 1949.

JEREMIAH McCARTHY,
Petitioner,

v.

AMERICAN EASTERN CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

JEREMIAH MCCARTHY, by his attorneys, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment for respondent entered by the United States District Court for the Eastern District of Pennsylvania in a maritime cause of action for maintenance and cure.

A. Summary Statement of the Matter Involved.

The suit at bar, being docketed in the District Court as of No. 283 of 1947 in Admiralty, is a seaman's action brought to recover maintenance and cure from respondent, American Eastern Corporation, the owner and operator of the M. V. "Gadsden". Petitioner's injuries were sustained on June 16, 1947, when, in the performance of his duties, he fell into the No. 5 hold of the vessel. On August 25, 1947, he brought two actions against respondent, one being the present libel in admiralty, the other—docketed in the District Court as of Civil Action No. 7669—being an action at law for compensatory damages under the maritime law as modified by the Jones Act (46 U. S. C. A. Sec. 688).

Solely for the sake of convenience and in order to avoid the necessity of duplicating certain proofs which were common to both actions (i. e. the fact of injury sustained in the service of the vessel, and the nature and extent of the injuries) the two cases were, by stipulation (R. 5a, 13) tried simultaneously in the District Court—the action at law for compensatory damages being tried to the jury, and the admiralty action for maintenance being tried to the Court. The jury returned a verdict in the damage action in favor of petitioner in the sum of $22,500. On appeal the Court below affirmed the judgment entered on the verdict. 175 F. (2d) 724.[1]

All reference to maintenance was scrupulously avoided in the damage action. The complaint made no claim for maintenance (R. 15). Petitioner made no attempt to prove its value—by specific agreement of counsel, testimony relating to the value of maintenance was deferred until after the jury had retired to deliberate on the damage claim (R. 11-12). The court's charge to the jury was completely silent as to maintenance (R. 17-30), as, too, were the requests for charge (R. 26-29). The interrogatories submitted to the jury did not call for any finding with respect to maintenance (R. 23-25), and it was clearly understood both by counsel as well as by the Trial Judge that the two actions, although tried simultaneously, would be independently submitted and determined. Nevertheless, solely because of the fact that petitioner had, in the damage action, testified that his wages aboard respondent's vessel consisted of $185.50 per month *plus room and board* (R. 10-11), the Trial Judge, in the present action, entered judgment for respondent upon the ground that "The jury . . . having returned a very substantial verdict for the libellant, the libellant is not entitled to a further recovery of maintenance (Conclusion of Law No. 4, R. 8a), and that "To permit a recovery here for maintenance would . . . be awarding a duplication of compensatory damages" (Con-

1. A Petition for Certiorari in the damage action as of No. 315, October Term, 1949, was denied on November 7, 1949.

clusion of Law No. 6, R. 9a). On appeal, the judgment for respondent was affirmed (R. 39). The present petition raises important questions concerning the doctrine of maintenance in the maritime law.

B. Jurisdictional Statement.

The statutory jurisdiction of this Court to review by Writ of Certiorari the judgment here complained of is conferred by Title 28, United States Code, Section 1254.

The judgment of the Court of Appeals sought to be reviewed was entered on June 14, 1949 (R. 39). Petition for Rehearing, filed on June 27, 1949, was denied on August 16, 1949 (R. 40).

C. Question Presented.

Under the maritime law are maintenance during disability and "keep" as an element of the seaman's wages identical legal concepts, such as to preclude an award of maintenance where the seaman has recovered from his employer full compensatory damages resulting from the same injuries?

D. Reasons Relied Upon for Allowance of the Writ.

The decision below is in direct conflict with the decision of this Court in *Pacific Steamship Company v. Peterson,* 278 U. S. 130, 73 L. Ed. 220, and virtually reads the ancient doctrine of maintenance out of the maritime law.

This Court, in *Pacific Steamship Company v. Peterson, supra,* decided that the right to maintenance is *cumulative* to the right to compensatory damages under the maritime law, *that it does not extend to compensation for the effects of an injury,* and that therefore *it does not affect or displace the right to recover compensatory damages* for injuries resulting from negligence or unseaworthiness.

The District Court at bar held that because in the action for compensatory damages petitioner had proved as part of his damages not only the monetary wage he received

but also the fact that room and board were furnished in addition to his monetary wage (Finding of Fact No. 22, R. 8a), to permit a recovery of maintenance would be "awarding a duplication of compensatory damages" (Conclusion of Law No. 6, R. 9a). This is clearly contrary to this Court's holding in the *Peterson* case, *supra,* for maintenance does not extend to compensation for the effects of an injury, and consequently, an award of maintenance cannot constitute a duplication of compensatory damages.

The Court of Appeals affirmed this ruling. Recognizing that under the *Peterson* case a judgment for compensatory damages is not a bar to a subsequent suit for maintenance, it held, nevertheless that "it does not follow that a particular item of his claim, such as maintenance, if recovered in one suit, may again be recovered in another" (R. 37). The Court of Appeals reached this conclusion upon the hypothesis that maintenance and "keep" are identical legal concepts and that consequently maintenance was an item of compensatory damages necessarily adjudicated in the tort action for damages. But if this is so, then the right to maintenance cannot be *cumulative* to the right to compensatory damages, and the seaman must yield either his right to maintenance or his right to full compensatory damages; he is thus forced to make the very election which was stricken down by this Court in the *Peterson* case. Here lies the fundamental conflict between the decision below and this Court's ruling in *Pacific Steamship Co. v. Peterson, supra.*

The implications of the present decision are disastrous to the maritime rights of merchant seamen. One of the unique features of the maritime law is the doctrine of maintenance, which has no counterpart elsewhere in the law. This right has been jealously guarded in a line of notable decisions in this Court. The decision at bar would destroy it.

This Court is not foreclosed from reviewing the conclusions of law here involved, even though based upon the concurrent findings of fact of the two Courts below.

Mahnich v. Southern Steamship Co., 321 U. S. 96, 99, 88 L. Ed. 561, 564.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for review and determination on a day certain, to be named therein, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket No. 9797, *Jeremiah McCarthy v. American Eastern Corporation,* and that the judgment of the said Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as may be just.

Respectfully submitted,

JEREMIAH MCCARTHY,
Petitioner,
By ABRAHAM E. FREEDMAN,
CHARLES LAKATOS,
WILFRED R. LORRY,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions Below.

The Opinion of the District Court appears at R. 5a. It is not reported. The opinion of the Court of Appeals appears at R. 34, and is reported in 175 F. (2d) 727.

II.

Statement of the Case.

Inasmuch as a statement of the case has necessarily been set forth in the Petition, a restatement here is omitted for the sake of brevity.

III.

Argument.

The Decision Below Is in Direct Conflict With the Decision of This Court in Pacific Steamship Company v. Peterson, 278 U. S. 130, 73 L. Ed. 220, and Virtually Reads the Ancient Doctrine of Maintenance Out of the Maritime Law.

The decision below is predicated upon the hypothesis that the admiralty action for maintenance was upon the same cause of action as the civil suit for tort damages, or more precisely, that the cause of action for maintenance asserted in admiralty was embraced within the scope of the civil action for tort damages. The Court below, without deciding that the "strict rules of res judicata are applicable to this situation" (R. 38), nevertheless held that the seaman's "keep" furnished to him aboard ship as a part of his compensation for services rendered is the same in character and monetary value as the maintenance to which, if

injured, he is entitled at the expense of the ship and her owner, and that while this Court has held in *Pacific Steamship Co. v. Peterson, supra,* that the recovery of a judgment for maintenance is not a bar to a subsequent suit for compensatory damages upon the ground of unseaworthiness or negligence, "it does not follow that a particular item of his claim, such as maintenance, if recovered in one suit, may again be recovered in another" (R. 37).

If this hypothesis (that is, that maintenance ashore during disability and "keep" aboard ship as an element of the seaman's gross wages are identical) is followed to its necessary conclusion, then in every case where the seaman has asserted and prosecuted to judgment a tort claim for damages, he must be held to have simultaneously prosecuted to judgment his claim for maintenance as well, with the result that the judgment in the first action will conclude him from thereafter asserting any claim for maintenance. For if there is in fact an identity or overlapping of causes of action, the judgment in the first case is an absolute bar to the subsequent action, not only in respect of every matter which was actually presented, *but also as to every matter which might have been presented: Baltimore S. S. Co. v. Phillips,* 274 U. S. 316, 71 L. Ed. 1096. Thus it is that if maintenance and "keep" are identical legal concepts then a judgment in the tort action is necessarily an adjudication of the maintenance claim as well, *and this is so even if no evidence whatever is presented on the issue of board and lodgings or "keep," for even if not actually presented, it is a matter which might have been presented.* Furthermore, this result must be reached not only where the judgment in the tort action is favorable to the seaman; *it must equally be so where the judgment is adverse to the seaman.* For a single cause of action may not be twice litigated to judgment. It is precisely at this point, which must necessarily be reached if the theory of identity of causes of action is carried to its ultimate conclusion, that the decision below comes into direct and inevitable conflict with this Court's decision in *Pacific S. S. Co. v. Peterson, supra,* 278

U. S. 130. For this Court there held that the right to maintenance is *cumulative* to the right to compensatory damages, *that it does not extend to compensation for the effects of the injury;* [2] and that therefore *it does not affect or displace the right to recover compensatory damages for injuries resulting from negligence or unseaworthiness.*

The effect of this Court's decision in the *Peterson* case, *supra,* may not be avoided by declining to follow through to their inevitable conclusion the implications of the decision below. The Court of Appeals avoids deciding that the "strict rules of res judicata are applicable." But we submit that there is no middle ground, no valid compromise, here. Either there is in fact an identity of causes of action or there is not. Either the doctrine of res judicata applies or it does not. To imply that there are rules of res judicata less rigid than "strict," and that there may be various shades and degrees, whose application depends upon circumstances nowhere defined, must lead to utter confusion.

The Court below attempts to avoid the effect of this Court's decision in *Pacific S. S. Co. v. Peterson, supra,* by holding that although under the *Peterson* case a judgment for compensatory damages is not a bar to a subsequent suit for maintenance, "it does not follow that a particular item of his claim, such as maintenance, if recovered in one suit, may again be recovered in another" (R. 37). But it is clear that if maintenance is, as the Court below holds, an item of compensatory damages, *then the right to maintenance cannot be cumulative to the right to compensatory damages, and this Court's decision in the Peterson case has been rendered meaningless.* Here lies the fundamental conflict between the decision below and this Court's ruling in the *Peterson* case.

Maintenance does not constitute compensation for the effects of an injury (*Pacific S. S. Co. v. Peterson, supra;*

2. Reaffirmed more recently in Calmar S. S. Corp. v. Taylor, 303 U. S. 525, 528, 82 L. Ed. 993, 996, where this Court said: "It (maintenance and cure) is not an award of compensation for disability suffered."

Calmar S. S. Corp. v. Taylor, supra, 303 U. S. 525 at 528) and therefore, it cannot affect or displace the right to compensatory damages. (*Pacific S. S. Co. v. Peterson, supra*). Consequently, it is fundamentally erroneous to equate the two, and more precisely, to equate maintenance to the seaman's "found" or "keep" aboard ship.

There is no doubt that "keep" as a part of petitioner's wages in his occupation as seaman was relevant to a consideration of the value of impairment of earning capacity, and whether or not proven or submitted to the jury, it was an element of damage adjudicated by the judgment in the tort action. *Baltimore S. S. Co. v. Phillips, supra,* 274 U. S. 316. But it does not follow from this that an award for maintenance is an award for "keep," or that to allow recovery for both results in a duplication either of compensatory damages or of maintenance. Impairment of earning capacity is one of the elements of compensatory damages. In determining the extent to which earning capacity has been impaired it is relevant, though not controlling, to compare the value of the injured persons actual earnings before and after the injury. Depending upon the character of the employment, compensation for services may consist entirely of cash wages, or partly cash and partly room and board (as in the case of seamen or of hospital orderlies) or entirely of room, board, clothing, etc. (as in the case of some domestic servants). Nevertheless, and although the employee may receive some or all of his wages in a form other than cash, the value of his earnings is determined by the value of all that he receives, in whatever form, in return for his services. Thus, in the case of a hospital orderly, his compensation is determined by the combined values of his cash wage and his board and lodging. So, too, in the case of a seaman. For it is evident that the fact that seamen receive their wages partly in cash and partly in "keep" reflects upon the amount of the *cash* wages they receive, that seamen and their employers, in bargaining for wages, bear this

fact in mind, and that this fact necessarily reduces the rate of *cash* wages ultimately agreed upon. The seaman's cash wage alone, therefore, does not truly reflect his earning capacity and, consequently, when his earning capacity has been impaired it is relevant to consider the value of his cash wage plus "keep" as evidence of the extent of impairment.

But a seaman's right to maintenance is upon an entirely different footing, and is in no sense related to compensation for services. It arises out of the unique relation between the seaman and his vessel, a relation whose history and unusual incidents this Court had occasion to thoroughly review within the last decade in *Aguilar v. Standard Oil Co.*, 318 U. S. 724, 87 L. Ed. 1107. It springs into being when the seaman enters the service of the ship and is conditioned only upon his being in the service. The duty to furnish maintenance becomes a matured legal obligation on the part of the ship at the moment the seaman is in need of it, and breach of that obligation raises an independent cause of action enforceable by the seaman, in which action the extent of recovery is not related to the value of his "keep" aboard ship, but is measured solely by the seaman's need. In other words, the claim is for reimbursement of such expenses as the seaman has necessarily paid or has become obligated to pay to maintain himself while disabled and in need of medical care. *Cortes v. Baltimore Insular Line,* 287 U. S. 367, 77 L. Ed. 368.

The duty to provide maintenance and cure finds its origin in the ancient maritime law. It arises out of the personal indenture by which the seaman is bound to his ship and by which the vessel, in return, is bound to him for wages and maintenance and cure. *Pacific S. S. Co. v. Peterson, supra,* 278 U. S. 130 at 137. The duty does not rest upon culpability or negligence. *Calmar Steamship Corp. v. Taylor, supra,* 303 U. S. 525. In *Cortes v. Balti-*

more Insular Line, supra, this Court described the origin and character of the duty as follows:

> (U. S. at 371) "The duty to make such provision is imposed by the law itself as one annexed to the employment. The Osceola, 189 U. S. 158, 47 L. Ed. 760, 23 Ct. 483. Contractual it is in the sense that it has its source in a relation which is contractual in origin, but given the relation no agreement is competent to abrogate the incident."

Nor is the measure of recovery for breach of the obligation to provide maintenance and cure equivalent to the value of "keep." "Keep" as an element of damage embraced in impaired earning capacity is measured by the value of board and lodging as furnished on board ship, while the value of maintenance is measured by other standards. This Court, in *Cortes v. Baltimore Insular Line, supra,* said:

> (U. S. at p. 373) "The failure to provide maintenance or cure may be a personal injury or something else according to the consequences. If the seaman has been able to procure his maintenance and cure out of his own or his friend's money *his remedy is for the outlay.* . . ." (Italics supplied.)

In *Smith v. Lykes Bros. Ripley S. S. Co.,* 105 F. (2d) 604, the Court of Appeals for the Fifth Circuit held:

> (p. 605) "The duty to provide maintenance and cure for a seaman falling ill or injured in the service of his ship is an obligation *in addition to mere wages and keep during the term of employment.* It is an incident to the contract of service, may extend beyond the termination of the voyage, includes care, nursing and medical attention, *and rests upon the seaman's need.* . . ." (Italics supplied.)

The Court below conceives that the monetary value of maintenance and "keep" are the same (R. 36-37). But

insofar as this purports to be a finding of fact, there was absolutely nothing in the record below to warrant any such conclusion since there was no evidence offered on either side on this point. The fact is, and we must of necessity here refer to matters dehors the record,[3] that under existing agreements between the National Maritime Union and a number of the largest shipowners, maintenance when due is payable at the rate of $6.00 per day.[4] During the recent war, general agents of government owned vessels were directed, under War Shipping Administration Directive (Operators' Regulation No. 108, affective August 1, 1945) to pay maintenance ranging from $3.50 per day to $6.50 per day depending upon the rank of the seaman involved. And yet, for Social Security purposes the companies have never, in our experience with literally thousands of cases, estimated the value of "keep" above $1.50 per day for unlicensed personnel. In the very case at bar, maintenance was stipulated at the rate of $3.50 per day (R. 12). In the face of this kind of factual situation, which is prevalent throughout the maritime industry, the conclusion of the Court below that the monetary value of maintenance and "keep" are the same is not merely unsupported in the record, but is contrary to the actual facts.

As a link in the chain of reasoning which led the Court below to conclude that maintenance and keep are identical legal concepts, the Court relies upon a statement found in the opinion of this Court in *Calmar S. S. Corp. v. Taylor, supra,* 303 U. S. 525 at page 528, to the effect that the maintenance exacted from the shipowner is comparable to that to which the seaman is entitled while at sea. The Court below seems to have missed the significance of the fact that this Court used the word "comparable", not "identical",

3. Matters which, however, we are prepared to support by further proofs under the procedure provided in Rule 15 of this Court, if necessary.

4. Article V, Section 15 of the standard form of agreement (dated August 18, 1948) provides:

"*Maintenance and Cure Benefits.* In adjusting maintenance and cure cases for legitimate out-patient treatment, the Company will compensate the man concerned at the rate of Six Dollars ($6.00) per day."

and that this Court did not say that the *duty* is comparable, but that the *maintenance* is comparable. This Court was evidently referring in general terms to the *kind* of maintenance to which the seaman is entitled if disabled, and was drawing a general comparison with the *kind* of maintenance to which the seaman is entitled while at sea. Obviously, the *kind* of maintenance exacted from the shipowner should in general bear a reasonable relation to the seaman's station in life, just as the support which a parent must provide for his child is generally of a character befitting the family's station in life. So, the quality of food and lodgings which the seaman receives while at sea may furnish some general guide to the seaman's station in life although, of course, it is by no means controlling. And just as a seaman may not use his right to maintenance as an occasion for demanding a suite at the Ritz, neither may the shipowner demand that the injured seaman reduce his accustomed standard of living to conform to the standards of the particular ship upon which he happens to be injured, where the ship's standards fall below the seaman's customary style of living.

But the real issue in this case is not whether the monetary value of maintenance and "keep" are the same, but whether the two are identical legal concepts. If the two are not identical then there was here no "duplication of compensatory damages" as the District Court held (Conclusion of Law No. 6, R. 9a). Nor can the petitioner be held to have recovered in the damage action his claim for maintenance, as the Court of Appeals has concluded, merely and solely because in that action the issue of "keep" as an element of compensatory damages was submitted to the jury. That they are in fact not identical has been clearly and unequivocally adjudicated by this Court in *Pacific Steamship Co. v. Peterson, supra,* wherein this Court held that maintenance does not constitute compensation for the effects of the injury, that maintenance cannot affect or displace the right to compensatory damages, and that the right

to maintenance and the right to indemnity or compensatory damages are consistent and cumulative. The decision below cannot be reconciled with the *Peterson* case.

It is evident therefore, that the decision below would completely emasculate, if not destroy, the seaman's ancient right to maintenance. It would destroy, first of all, the right in every case where the seaman has a cause of action for compensatory damages. More than that, unless in the particular case the seaman's tort claim for damages is certain to result in a favorable verdict the seaman will be forced to prosecute the tort claim at his peril, for should the judgment in the tort claim be adverse, he will be deprived of all remedy under the maritime law. He will in practical effect be forced to make the very election which was stricken down by this Court in *Pacific Steamship Co. v. Peterson, supra,* and will be compelled in many cases to abandon altogether his right to compensatory damages solely because the hazards of the tort litigation may not be worth the risk. And finally, what would befall the custom of the maritime trade of providing maintenance "in kind concurrently with its need"[5] if the obligation to provide it hinges upon and may be completely obviated by the final outcome of a possible tort claim for damages?

We submit that the kind of problem here involved cannot be adequately resolved unless the major foreseeable implications are successfully met and disposed of. Some of the prominent aspects of the problem have already been indicated. Others the Court below has itself recognized without, however, any attempt to dispose of them or to integrate them into the conclusion reached. In *Farrell v. United States, supra* footnote 5, this Court recently had occasion to observe:

> (L. Ed. Adv. Op. at 661) "It has been the merit of the seaman's right to maintenance and cure that it is so inclusive as to be relatively simple, and can be under-

5. Farrell v. United States, U. S. , 93 L. Ed. Adv. Op. 658 at 662.

stood and administered without technical considerations. It has few exceptions or conditions to stir contentions, cause delays, and invite litigation."

And yet the decision below would accomplish precisely the contrary result, in great measure due to the very reason that it fails to dispose of vitally important questions inherent in the problem. We conclude with a few such additional considerations not previously noted.

In *Jones v. Waterman S. S. Corporation,* 155 F. (2d) 992 (decided May 28, 1946) the Court of Appeals for the Third Circuit, in an opinion by Chief Judge Biggs, squarely rejected the contention that "keep" is the equivalent of maintenance, and that recovery of the one forecloses recovery of the other. It fully recognized and applied the distinction made by this Court in *Pacific Steamship Co. v. Peterson, supra,* between the right to maintenance on the one hand and the right to compensatory damages on the other. Although the distinction between the principles underlying the *Jones* case and those underlying the present case is not apparent to the naked eye, the present decision, in which Chief Judge Biggs did not participate, completely ignores the *Jones v. Waterman* decision. The net result of the two decisions is an anomaly, for if a seaman proceeds in a tort action against a party other than his employer, (as in *Jones v. Waterman S. S. Corp., supra*) he may recover maintenance from his employer as well as full compensatory damages from the third party, whereas if the tort feasor happens to be his employer, the seaman must yield either his right to maintenance or his right to full compensatory damages.

Under the decision below what would be the effect upon the right to future maintenance, of an award embracing future compensatory damages (including the value of "found" as an element of impaired earning capacity) in the light of this Court's prohibition against a lump sum award for future maintenance in *Calmar S. S. Corp. v. Taylor,* 303 U. S. 525, 82 L. Ed. 993? The Court below recog-

nizes the problem (R. 37) but conceiving that it involves questions not presented by the case at bar, declines to integrate it into the conclusion reached.

This Court, in *Aguilar v. Standard Oil Co., supra,* 318 U. S. 724, 731, reaffirmed the rule that conceptions of contributory negligence have no place in the liability for maintenance or the defense against it. But the Court below declines to meet the problem presented in a case where the damages in a tort action are diminished by virtue of contributory negligence (R. 36). What possible solution can be reached in such situation in the light of the inevitable conflict created between the theory of identity announced in the present decision below and the rule reaffirmed by this Court in the *Aguilar* case, *supra*?

If maintenance and keep are identical legal concepts, it would seem to follow that unless the seaman is entitled to maintenance, he is foreclosed from submitting to the jury the issue of "keep" in his tort action for damages. Strange consequences would result. For example, in an action for wrongful death the seaman's personal representative would be foreclosed from recovering full compensatory damages, since in such case no right to maintenance can accrue under the maritime law. Likewise, when the injured seaman's condition has reached a point where the maximum cure possible has been effected. *Farrell v. United States, supra.* While he may be entitled to compensatory damages beyond that point, it would seem that such damages would be diminished by virtue of the fact that he is thereafter no longer entitled to maintenance or keep. The ultimate consequences of the decision below may be demonstrated by comparing the seaman's rights to those of a shore employee such as a hospital orderly. If the latter is injured by tortious conduct, there is no doubt but that in a damage action under the common law he may prove the value of his board and lodging as bearing upon the value of his earning power, and thus recover full compensatory damages. And this result is achieved despite the fact that maintenance is unknown

to the common law, and an injured person's expenses in maintaining himself while disabled and in need of medical care have never been suggested as an element of common law compensatory damages. Under the decision below, however, a seaman, although he is accorded the unique and *cumulative* maritime right to maintenance, can recover no more than the hospital orderly at best, and in those instances where he is not entitled to maintenance, though properly entitled to compensatory damages, he cannot recover as much.

CONCLUSION.

The right to maintenance ashore during the period when the seaman, injured or having fallen ill in the service of the ship, is in need of medical and convalescent care is a right fashioned by the maritime law *in addition* to the right to full compensatory damages for injury sustained through negligence or unseaworthiness. The two are dissimilar in origin, scope, purpose and effect, and consequently the right to maintenance is not embraced within the scope of a tort action for compensatory damages even though in such action the value of "keep" as an element of the seaman's gross wages is relevant to a consideration of the value of impaired earning capacity resulting from disability. The decision below is in direct conflict with the decision of this Court in *Pacific Steamship Co. v. Peterson, supra.* It necessarily cripples and emasculates the doctrine of maintenance, and will in many instances destroy the right altogether. We respectfully urge this Court to grant the petition.

Respectfully submitted,

Abraham E. Freedman,
Charles Lakatos,
Wilfred R. Lorry,
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IN THE

Supreme Court of the United States.

No. 452.

OCTOBER TERM, 1949.

JEREMIAH McCARTHY,

Petitioner,

v.

AMERICAN EASTERN CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

COUNTER STATEMENT OF THE CASE.

The Petitioner, Jeremiah McCarthy, was injured on June 16th, 1947 on board the Respondent's vessel "Gadsden". On August 25th, 1947 he instituted two suits against the Respondent. One was a civil action in which he sought damages. The other was a libel in admiralty seeking maintenance. His medical attention or "cure" had been furnished without cost to him.

The two cases were heard together. Petitioner's counsel requested the Trial Judge to instruct counsel for the Respondent that the question of maintenance was not to be mentioned before the Jury in the civil action. Nevertheless the Petitioner testified before the Jury in his damage

action that he had lost not only monetary wages but his board and lodging on board the vessel by reason of his disability. That evidence was elicited in the Petitioner's case in chief. The Jury awarded him substantial damages which the Trial Judge found were adequate to cover not only the loss of Petitioner's monetary earnings but also any loss he might have had by being deprived of board and lodging in his occupation as a seaman.

The District Judge refused to award maintenance under the circumstances, holding that it would be a duplication of the Petitioner's recovery to permit him to have an award for maintenance in his admiralty suit after having proved maintenance as one of the elements of his damages in his civil action.

The Court of Appeals affirmed.

ARGUMENT.

In his brief in support of the Petition, the Petitioner insists upon stating as his major premise the proposition that both decisions below are predicated upon the "hypothesis that the admiralty action for maintenance was upon the same cause of action as the civil suit for tort damages" (brief, 7).

That has never been the position of the Respondent nor is it the holding of either of the Courts below. The basis upon which the District Court and the Court of Appeals deny Petitioner recovery for maintenance is that since he recovered the value of his board and lodging in his action for indemnity, it would be a duplication of recovery to award it to him again in his admiralty suit for maintenance.

The Court of Appeals said: (slip opinion, 4)

> "For in the admiralty as elsewhere in the law a litigant may not recover compensation for a single claim more than once. The ancient rule in the admiralty that the vessel and her owner must provide an injured seaman with maintenance was intended to assure him three meals a day and a bed in which to sleep during his treatment and convalescence. There is no basis in logic or law for assuming that he may ask for six meals a day or twin beds, however."

The Petitioner seeks to assert conflict between that holding and this Court's decision in *Pacific S. S. Co. v. Peterson,* 278 U. S. 130. We will attempt to demonstrate that there is no conflict but in fact the Peterson Decision is in accord with the holding below.

Whether a second cause of action is barred is not determined by the relief which has been asked but whether the same evidence will support both causes of action. *Freeman, Judgments,* § 259; *In Re Samuels,* 263 F. 561. Estoppel by judgment is not dependent upon whether the same demand is made in both cases but it exists where the question has been previously concluded by a judgment between

the parties. The test of the identity of causes of action is the identity of the facts essential to maintain them. *City of New Orleans v. Citizens Bank of Louisiana,* 167 U. S. 371; *Munn v. Des Moines Nat. Bank,* 18 F. 2nd 269; *Hutchinson v. Sperry,* 1 F. 2nd 302. In the latter case the Court said:

> "While the first suit embraced several causes of action, we are unable to discover any legal distinction between one of these causes of action and the cause of action in this suit. Both arose out of the same controversy; both rested on the same facts; in both the same fradulent acts were charged; both were tried on the same record. *'The true test of the identity of causes of action is the identity of the facts essential to their maintenance.'* " (Emphasis ours.)

Neither the Petition nor the brief state with accuracy the question actually decided by the Court below nor even the question which was presented for decision to the Court below. Neither the Court of Appeals, the District Court nor this Respondent asserts that the Petitioner's "admiralty action for maintenance was upon the same *cause of action as the civil suit for tort damages*" (brief, 7—emphasis ours). The Respondent asserts and both of the Courts below have held that the monetary value of Petitioner's loss of board and lodging, i. e. his maintenance, was litigated in his civil suit for damages and he recovered it in that suit. That is the reason that he has been denied recovery in his admiralty suit for maintenance. To grant Petitioner recovery in his suit for maintenance would be to grant him recovery a second time for these same items.

To assert as this Court did in *Pacific S. S. Co. v. Peterson, supra,* that maintenance and *compensatory* damages are consistent and cumulative does not prove that "a particular item of his claim, such as maintenance, if recovered in one suit, may again be recovered in another" (Opinion below, R. 37). The Court below recognized that the recovery of a judgment for maintenance by a seaman would

not bar a subsequent suit by him for damages and that is all that the rule of the *Peterson Case* asserts.

It is noteworthy that the Petitioner does not cite to this Court a single case where any Court has sanctioned the double recovery which he seeks. A number of courts have considered the problem and with unanimity have taken the same position which was taken by the Court below.

In *Smith v. Lykes Brothers—Ripley S. S. Co., Inc.,* 105 F. 2nd 604, (CA 5), the Court had a somewhat similar situation before it. It could not decide the problem because the Record before it was inadequate, but it stated:

> "So the ultimate question comes to this: In the two cases is there duplication or overlapping of the same elements of expense resulting from one and the same injury? The principle that really applies is one either of payment or of estoppel by judgment, or both. The issue is whether or not the items of damage here involved were actually litigated and determined in the former case."

In *Muise v. Abbott,* 160 F. 2nd 590, (CA 1), a tort feasor other than the employer was involved. The seaman had been injured on the dock and settled with the dock owners. He then sued the shipowner for maintenance and cure. The Court of Appeals for the First Circuit said:

> "But it does not follow from this, as the Appellant contends, that he can recover full damages in both of the actions available to him. The reason for this is that the damages recoverable in each action to some extent overlap, and the rule prevails in admiralty as elsewhere in the law that no one may recover compensatory damages more than once."

In *Runyan v. Great Lakes Dredge and Dock Co.,* 141 F. 2nd 396, (CA 6), a seaman sued for damages and recovered a jury verdict which was paid. Several years later he sued to recover additional items as maintenance

and cure. In the first or damage suit Runyan had sought recovery of these same items. The Court of Appeals held:

> "The substance of appellant's claim in the present action is identical with that in the first action. He introduces in the present action three elements which were a part of the claims in the first suit.
>
> "While appellant had two causes of action, the matter which he litigated in the former suit is essential to a decision in the case at bar. Under these circumstances the proceeding is in the nature of splitting his cause of action and the rule applies that he who avails himself of a judgment for a part of an entire indivisible claim estops himself from maintaining an action upon any other part of it."

In *Ottinger v. Walling,* 335 Pa. 77, the plaintiff first sued under the Jones Act and at that trial proved his loss of wages, medical expenses and the fair value of his maintenance. He recovered a verdict which was paid. Thereafter he instituted a second suit under the general maritime law to recover his maintenance. The Supreme Court of Pennsylvania said:

> "Accordingly, the narrow question raised by these pleadings is whether the plaintiff in the trespass action under the Jones Act recovered the maintenance which he now seeks under the general maritime law. The defendants urge that the verdict in the prior suit embraced every item of damage that the plaintiff had sustained at the time of the trial, or that he might suffer in the future, including loss of past wages and maintenance, and loss of future earning power. The record in this case is decisive that the plaintiff is without right to recover. The same item of damage may not be recovered more than once, even though the subsequent proceeding may be upon a different right of action, because the prior judgment operates as an estoppel when the subject matter controverted and determined

is identical; *Rauwolf v. Glass,* 184 Pa. 237; *Bowers' Estate,* 240 Pa. 388; *People's Water Co. v. Pittston,* 241 Pa. 208; *Havir's Estate,* 283 Pa. 292."

Upon related subjects this Court has considered the questions of duplication of recovery and estoppel by judgment on a number of occasions. In *Tait v. Western Maryland Ry. Co.,* 289 U. S. 620, it said:

> "The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action."

In the last cited case the Court held:

> "The petitioner may not escape the effect of the earlier judgment as an estoppel by showing an inadvertent or erroneous concession as to the materiality, bearing or significance of the facts, provided, as is the case here, the facts and the questions presented on those facts were before the court when it rendered its judgment."

See also *United States v. Moser,* 266 U. S. 236; *State of Oklahoma v. State of Texas,* 256 U. S. 70; *Southern Pacific R. Co. v. United States,* 168 U. S. 1. The rationale of *Magnolia Petroleum Co. v. Hunt,* 320 U. S. 430, clearly supports the proposition that an injury gives rise to but one cause of action and merely because recovery in different forums affords a different measure of recovery does not sanction a double recovery. Damages, like demurrage, "may be no more than fair indemnity when gains have been lost or enjoyment seriously disturbed", *Brooklyn Eastern District Terminal v. United States,* 287 U. S. 170 at 176.

This Court has held that the maintenance which the shipowner must pay to his seamen "is comparable to that to which the seaman is entitled while at sea". *Calmar v. Taylor,* 303 U. S. 528. The Petitioner attacks that holding because, he says, (brief 13) a different allowance is made to disabled seaman for maintenance ashore than is used for tax purposes when the same seaman is working and living aboard ship. It is not surprising that the cost is different. Anyone who has ever traveled knows full well that the cost of a hotel room and meals in a restaurant greatly exceeds their cost in his own home. Petitioner's argument would only be valid if every sick and injured seaman was fortunate enough to have his disability occur in his home port. The chance of that occurring is of course remote.

Maintenance ashore and board and lodging at sea should be comparable. From time immemorial the Courts have refused to allow seamen monetary recovery for maintenance during the period they were receiving actual maintenance in a hospital without expense. Petitioner asks to overthrow that rule as well as the rule of *Calmar v. Taylor, supra.* All that the Court below has done is apply the reasoning of those rules to the facts of the case at bar. In doing so it denied him double recovery—"twin beds and six meals a day" was the way the Court of Appeals phrased it. Its holding is eminently correct and the case does not merit review by this Court.

CONCLUSION.

The Petition should be denied.

Respectfully submitted,

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